No. 10989.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACOB MORRIS DANZIGER, TRINIDAD INTERNATIONAL PETROLEUM, LTD., and WAKE DEVELOPMENT COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Reply to Appellee's Amended and Supplemental Brief.

A. BRIGHAM ROSE,
801 Continental Building, Los Angeles 13,
Attorney for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 10989.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACOB MORRIS DANZIGER, TRINIDAD INTERNATIONAL PETROLEUM, LTD., and WAKE DEVELOPMENT COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Reply to Appellee's Amended and Supplemental Brief.

Preliminary Observations.

In approaching the task of a replication to Appellee's Amended and Supplemental Brief, it at once becomes apparent that Spencer's observation in his Principles of Psychology, that it is impossible while staring at the sun to think of green, is repudiated by the author of said brief, whose views reflected therein are not hospitable to the image of anything antagonistic to the prosecution's supposition that the Indictment in this case perforce establishes that appellants are guilty of the offenses therein charged—albeit a concession is made now for the first time that the conviction on Count 15 is confessedly erroneous. (See Brief, p. 48.)

We shall presently demonstrate that this admission strikes at the very foundation of the whole case against appellants. The prosecution in its inception was based on an indictment procured on the testimony of a single witness who had no direct contact with any of the appellants and hearsay by an S. E. C. investigator who admitted having no knowledge of the facts. [See Assignment of Error #5, R. p. 177, *et seq.;* Op. Br. pp. 5-7.]

The trial was had on a soritical array of conveniently adopted syllogisms along the following plan: The conspiracy was formulated in 1935. None of the matters charged in the indictment has any relationship to the agreement shown to have been entered into at the time; but we have a co-defendant named Carter, etc., who will testify he made representations directly and indirectly through and to various unproduced persons under various pseudonyms which he will *now* reveal for the first time. These activities are not shown by the evidence to have been known to the defendants on trial (appellants). They, however, show reckless abandon and disregard of good intentions on the part of said Carter. Hence, since Danziger admits he met this person years before the transactions charged in the indictment, he and the corporations are necessarily privy to and bound by all the declarations and acts of said Carter.

This Platonian doctrine of *ignoratio elenchi* is adopted as a substitute for legal argument in response to our contentions and irrefutable authorities before this Honorable Tribunal.

It is respectfully submitted by appellant that the all-important query, to-wit: Precisely what was the conspiracy (a) upon which the indictment was procured;

(b) upon which evidence was received at the time of trial; (c) who were the parties to the conspiracy; (d) when did it originate; (e) when did it terminate, if at all; and finally (f) what relationship exists between the conspiracy charged in the indictment, the alleged proofs at the time of trial, and the theories now advanced before this Honorable Appellate Tribunal?

We respectfully submit the answer is—none.

Indisputable Facts.

It is material to note the theory upon which this case was tried. The transcript of the record reflects that the trial judge assumed the position that the defendants were enmeshed in proceedings involving the sale of privately owned stocks of Wake Development Company which they had acquired in 1933 and which they were assertedly engaged in offering for public distribution in 1935. [R. p. 1805.]

The trial judge, by its ruling striking the counts involving the contention that the stock offered in question was subject to registration under the S. E. C. Act, conclusively establishes that the shares of stock in question were privately owned shares of Wake Development Company, one of the corporate defendants, and not subject to registration. [R. p. 1809.]

The record can be canvassed from end to end and no rational conclusion drawn other than the contention by the Government that the conspiracy charged in the indictment is one that was asserted to have been entered into in the City of New York in the early part of 1935.

May we respectfully advert to the inquiry of the trial judge of Government's counsel? [R. p. 573.]

> "The Court: When do you claim the conspiracy was formed?
>
> Mr. Lucas: We do not allege a definite date.
>
> The Court: What is your claim now?
>
> * * * * * * * *
>
> Mr. Lucas: The conspiracy was formed prior to 1935, at or about that year."

The brief of appellee adopts the theory that the conspiracy in question was one entered into in the spring of 1935 in New York. An examination of appellee's brief tends to advance the theory that the case is predicated on a meeting of appellant Danziger with defendant Carter, etc., in New York in 1935. (Brief, p. 10.) The statement of the alleged conspiracy reflected at said page is as follows: That early in 1935 Danziger met Carter in New York and sought his aid as a security salesman in disposing of shares of T. I. P. stock to members of the public.

It may not be amiss at this point to indicate the disportions reflected in the brief as a whole. As contradistinguished from said contention, the evidence shows that Carter had ascertained from a stock broker in New York that appellant Danziger had a very good oil proposition. [R. p. 1027-28.] The testimony of Carter is to the following effect: He met Danziger in the spring of 1935 and stated: "I understand you have a proposition that I might be interested in. Will you tell me about it?" [R. p. 1033.] The draftsman of the appellee's brief then proceeds to state at page 10 that Danziger proposed to Carter the sale of a block of 165,000 shares of Trinidad Interna-

tional Petroleum stock issued to the Wake Development Company. It will here be noted that no citation to the record for said contention exists. As pointed out in our opening brief, all preliminary discussions with Warren, alias Carter, etc., culminated in an agreement with a *bonafide* concern known as the G. E. Company, wherein it was provided that no more than 20,000 shares of privately owned stock of Wake Development Company would be offered to their stockholders. This agreement was introduced by the Government as their Exhibit No. 82 and appears in the appendix to our opening brief at page 107, the *bonafides* of which agreement has never been disputed by the Government in any wise.

At the risk of repetition, we again call attention to the fact that in the recitals set forth in appellee's brief, the failure to point to evidence by reference to the record is flagrantly manifest. It would rather considerably extend this brief to take the time to point out the various misstatements, although we are endeavoring to focus our attention on the points that are essential for consideration. For example, in the brief at page 10 it is stated that a certain number of shares were returned to the treasury of Trinidad International Petroleum, and from these 165,000 had been issued to Wake Development Company. The facts pertaining to this phase of the case appear solely through the evidence in the transcript, page 693, wherein it is reflected that the 165,000 shares to Wake Development Company came out of the 500,000 shares delivered to the owners of the oil rights transferred to the T. I. P. Company. See also Exhibits R and 112.

Appellee's brief, page 11, proceeds to recite that the T. I. P. Company had "nebulous assets." It will be noted that the vagaries of the assets of said company exist solely in the mind of the author of the brief, for the

reason that nowhere is there any reference to any evidence to support this contention.

It should also be here noted that as distinguished from customary practice, namely, references to evidence adduced at the trial, counsel for the Government in the main, intermittently makes reference to an exhibit,, *to-wit:* Exhibit No. 92, which is a deposition taken by the Securities & Exchange Commission, which consists of hundreds of pages, which deposition was taken by Alan G. Mainland, Examiner for the Securities & Exchange Commission, at which occasion appellant Danziger was produced as a witness for and on behalf of the Commission in an inquest pertaining to Trinidad International Petroleum, Ltd. [See Tr. pp. 679, *et seq.*] This deposition was read into evidence over violent objections of appellants' counsel, as will be noted at *id.* page 638. No attempt is made on the part of the draftsman of appellee's brief to aid the Honorable Justices of this Court or counsel for appellants by reference to any particular page, Government's counsel apparently being content to have your Honors and opposing counsel search the several hundred pages of said transcript to ascertain whether the generalities, conclusions and deductions of said draftsman may in fact be therein found.

It will be noted that in appellee's brief the feeble endeavor to outline the conspiracy entailed rests upon the *ipse dixit* of the defendant Warren, alias Carter, *et al.* As previously noted the indictment was not predicated on any information or facts related by him prior thereto. Stripped of its tinsel garb, appellee's brief reflects a total reliance on the declarations of the despicable character named Warren, alias Carter, etc., as testified to by him at the time of trial.

In our opening brief we pointed out that the documentary evidence which found its way into the record, without even an opportunity for inspection by the defendants' counsel, admittedly reflected a state of facts contrary to the contentions of the Government. When objections were interposed thereto, the trial court inquired of Government's counsel. [R. pp. 774-6.]

> "Mr. Lucas: * * * We will have Mr. Carter here, who I believe handled that transaction for the conspirators, and we will offer his testimony on it.
>
> The Court: What will he say, Mr. Lucas?
>
> Mr. Lucas: I will have to say to your Honor candidly I can't recall that I have personally discussed this Lawyer transaction with him.
>
> The Court: What will he say as to similar instances?
>
> Mr. Lucas: I wouldn't attempt to tell your Honor.
>
> The Court: Will he say this was part of a build-up; that is your theory?
>
> Mr. Lucas: That is my theory that he will. Not having discussed the particular Lawyer transaction with him, I wouldn't want to hold that out to the Court.
>
> The Court: Will he say that this was part of a build-up generally in these other transactions?
>
> Mr. Lucas: That is my belief, that he will, yes, your Honor."

Adverting to appellee's brief, page 11, we find the Government in outlining the alleged conspiracy, makes reference to discussions between Warren and Danziger in the spring of 1935 in New York, in which, among other things, allusion is had to the fact that the S. E. C. had authorized the sale of 200,000 shares of Trinidad to

the public at $5.00 per share. It is conceded by the Government and the said all-important witness Warren, *et al.,* that Danziger had stated that none of these shares were sought to be sold at that time, but that it was the personally owned shares of Wake Development Company which were being offered. The Government admits that the appellants never represented that they were selling any shares other than the personally owned shares of Wake Development Company, and that treasury shares of the Trinidad Company were not being offered.

Appellee's brief proceeds to outline that there were transactions approaching some South American Oil Co. former stockholders and G. E. stockholders; that a particular salesman using an alias was introduced and that a build-up letter, *to-wit:* Exhibit 41, was formulated between said Warren, appellant Danziger and a Mr. DeHart to circularize some G. E. stockholders. We apologetically submit that all of this is manifestly just so much gibberish. At the trial Government's counsel adopted a similar attitude. The record reflects that at that occasion counsel for appellants was objecting to the introduction of matters not mentioned in the indcitment, whereupon Government's counsel stated: "We have alleged certain things and said that there were many other representations and we feel that we are entitled to prove every representation made by any defendant as a part of the scheme to defraud, and that we are not held down in the trial of the case to just those representations which we have set forth."

"The Court: I am not going to hold you down." [R. p. 458.]

The irrefutable fact in the record is that not a single count in the indictment pertains or relates to any agree-

ment, understanding or so termed conspiracy arising out of the discussions, undertakings or agreements had prior to the departure of Danziger for England. In appellee's brief, p. 18, it will be noted that it is therein admitted that "Danziger went to England after the first sales in 1935 and returned to New York, arriving there September 20, 1937. After Danziger went to New York, Warren communicated with him. There had been sales of Trinidad stock prior to Danziger's departure, *but none were made to Great Eastern Natural Gas shareholders after he left.*"

This confessedly being the position of the Government, in what respect did the letter, Exhibit 41, or right certificate, and, for that matter, the whole program devised in New York in 1935, have to do with any of the counts set forth in the indictment? We previously submitted that the plan agreed on in New York was not one between these appellants and Warren, alias Carter, etc., but rather was with the G. E. Company. The Government, by its evidence in the form of Exhibit 82 and the testimony of Warren, establishes that. The Government in its proofs established that said agreement was actually entered into between the G. E. Company and the Trinidad Company, in which the Commonwealth Trust Co. of Wilmington, Delaware, was the escrow holder, that 20,000 shares [R. p. 1314] were to be made available to former G. E. stockholders, with a right certificate, that Wake Company was to receive $1.00 and the Dube Company $2.00, and as contra-distinguished from the recitals in appellee's brief, the Wilmington Trust Company was to collect the checks of the Wake Development Company and clear them and send on the proceeds to Wake Company or to Mr. Danziger in London. [See R. p. 1084.]

To recapitulate, the Government's proof, boiled down to its essence, reveals that (a) there was some reputed talk between Danziger, Carter, DeHart and other respecting the sale of some personally owned shares of Wake Company. These discussions culminated in an agreement in writing [Ex. 82], and not a single count charged in the indictment pertains or relates to the preliminaries or conclusion of the agreement in question. Hence, of what significance are any of these discussions, asserted agreements, or program?

It now becomes significant to note that the record indelibly reflects that if any of the negotiations or various discussions acted upon in New York are reputedly significant, the whole thereof was repudiated and terminated unequivocally long prior to any act or transaction charged in the indictment. [Exs. L and N.]

The Government introduced an exhibit, *to-wit:* No. 104, emanating from England under date of November 16, 1935, in which Danziger declares that he is not interested in any sales in the United States, that he can do better in England. In connection with this phase of the case, we must consider Exhibits L, M and O, which in the order named reflect that certain shares of Wake's personally owned stock were sold prior to receipt of cancellation of the Wilmington contract. These exhibits definitely establish that Danziger from England cancelled all arrangements made prior to his departure in 1935 for London, and that even in respect to transactions consummated prior thereto it would be necessary to communicate with Wake Development Company, one of the defendants herein, in regard to consummation of the then existing transactions. Appellee's brief confesses this situation (p. 18), but endeavors under a strained and unsupported

supposition, to assert that subsequently, while Danziger was in England, Warren advised him that he was going to make arrangements with a Canadian broker. The recitals in said brief, although it refers to Exhibit 95, misstates the documentary and oral testimony, it being conceded that Danziger had cancelled all arrangements entered into in New York in 1935 and having remained in England until 1937, it becomes incumbent upon us to inspect the record to see what arrangement, if any, was thereafter made.

There is an omnibus declaration that Warren (Carter) wrote Danziger that he was going to negotiate with a Canadian broker (App. Br. p. 18). However, the straining of all resources will not disclose an iota of evidence as to what this arrangement was. Consider, for example, the testimony of the main proponent of the Government's case, *to-wit:* Warren, alias Carter, etc., and it will be noted in the transcript [p. 1146] that he has no recollection of ever informing Danziger concerning certain Canadian mining transactions.

Let us now advert to the appellee's brief for illumination. It will there be noted that the synthetic sequence is founded upon a reference to an exhibit, No. 95. Inspection of this exhibit will disclose that it is a typewritten document without date save and except "Tuesday the 6th" and no year and with no signature; and accepting this document as being worthy of consideration, it will be observed that the instrument in question proposes an organization in Canada by means of a sub-lease and proposes the enlisting of Canadian brokers in the prospective proposal.

Before departing from consideration of the contents of page 18 of appellee's brief, it is significant to consider

the concluding observation that the draftsman submits, that what he has proffered establishes a conspiracy to sell worthless stock to simple people and to leave them to believe that a ready market for the stock was in existence. Here it is important to note that no reference is made to any evidence anywhere in the record.

We consider it of tremendous moment to at this point advert to the chief point of discussion at the time of oral argument, *to-wit:* that it appears from the Government's contention at the time of trial and from a reading of the Government's brief that, notwithstanding the total lack of evidence to reflect the contention, it is nevertheless maintained that the stock in question sold to the persons named in the indictment and others was worthless, etc., etc. If this contention is to receive any consideration, it at once becomes apparent that the point urged at the time of oral argument, namely that the trial judge in denying the application of appellants for a continuance, committed prejudicial error, is manifest. Danziger in his application for a continuance (App., p. 100, Op. Br.) pointed to the fact that it was necessary in support of his defense to take the depositions of numerous persons and companies to reflect the following:

(a) that millions of dollars had been spent in the acquisition of the properties in question;

(b) that the assets of said company were of great value;

(c) that in excess of half a million pounds in British money had been expended in the acquisition and development of the properties prior to the rights acquired by appellant Trinidad Company;

(d) that the titles to the leases held by Trinidad Company were *bonafide* and good;

(e) that various British concerns were interested in financing drilling activities;

(f) that in truth and in fact there were over-the-counter markets for the Trinidad Company's stock in England;

(g) that the *bonfides* of the G. E. Company's contract with De Hart and Palmer, who were mentioned in connection with the agreement, Exhibit 82, were genuine and that the documents, as distinguished from the contentions of the Government that they were mysteriously obscured were indeed in possession of a reputable London Company.

All of these matters were expressly asserted in the application for a continuance and were recognized by the trial court as manifestly important, but nevertheless made unavailable to appellants by reason of the refusal to grant the requested continuance.

It at once becomes important to give heed to the following significant questions:

(a) Does the Government, as reflected in its brief, contend that the Trinidad Company did not possess valuable property rights?

(b) That its shares of stocks and notes were not of the value represented?

(c) Were the activities of the appellants aimed at actual development of the assets with a view to fulfilling any representation made on their part to anyone?

If so, the denial of the application for a continuance was manifestly prejudicial, and under the admitted exigencies of the case deprived appellants of their right to a fair and impartial trial.

Use of Aliases.

A perusal of the briefs submitted on the part of the respective parties to this cause will at once reflect that at the time of trial and in the contentions submitted to his Honorable Judicial tribunal, vital significance is attached to the use of purported aliases on the part of several personalities involved in the transactions. Firstly, considering the alleged aliases sought to be impugned against the integrity of appellants, the names of Levy, Postal and Bishop receive consideration. There is no evidence contradicting the assertion on the part of appellants that Postal and Bishop were officers of Wake Development Company, and that Levy was an actual relative of appellant Danziger. It at once becomes apparent that insofar as these especial names are assumed to be significant, such persons in fact existed and the use of their cognomens were not shown to be unauthorized or utilized in perpetration of any fraud.

It was shown in our opening brief that the Government's principal witness, *to-wit:* Warren (Carter, etc.) confesses that he was known to all of his legitimate confreres under the name of Warren or Carter and that he did not use any other names until after the Chicago trouble, which was some time in 1937. The trial judge inquiring of said witness re his use of the name of Carter [R. p. 1289] elicited from the witness that the reason for the use of said name was not by reason of attempting to conceal his identity, but that he took the name under the accepted practice of legitimate stock salesmen who have a flare for taking a name that will register with their prospects. A wholly unsupported contention submitted to the Honorable Justices of this Court in the brief of appellee is that the appellants were privy to the

utilization by Warren of the various aliases disclosed in his testimony produced at the time of trial. In this connection, it is significant to note that there is not a scintilla of evidence in the record to show that prior to the taking of the stand by Warren his utilization of fictitious names was ever made known to any of the appellants. The witness Warren admitted that he did not use any fictitious names other than the names of Carmen and Carter until 1937, which is some two years subsequent to the alleged conspiracy formulated in New York [R. pp. 1097, 1192, 1194] and the responses elicited from the Court's inquiry. [R. p. 1289.]

It is to be noted that the Government relies apparently for knowledge on the part of appellants on the declarations of Warren admitted at the time of trial to this effect: "I communicated with the Wake Development Company in Los Angeles. I told them that I wanted to make a transaction." However, it will be noted that in not a single instance was any original or copy of such communication presented in evidence, nor its contents related. It is elementary that this is no substitute for legal evidence and no assumptions can on precedent be drawn from such generalizations. In order to remove any doubt of our contentions, we submit that the record will nowhere show:

(a) that there was ever any understanding or agreement that any alias was to be used by anyone;

(b) that any appellant was ever advised that an alias was being used.

Let us illustrate by a clear-cut reference to the record of the fallacy of the Government's position on this particular subject. Let us go directly to the subject of the

use of "O. T." respecting which much ado is made in appellee's brief and at the time of trial. It is true that there are a number of memoranda which constitute part of the maze of documents introduced, which in particular instances have reference to a memoranda in which resort is had to the letters "O. T." However, they cannot be pointed in this record to the identity of any specific person as "O. T." It is admitted that these letters are an abbreviation of the colloquialism "Old Timer." However, the record evidence will fail to establish the identity of "O. T." It is the contention of the Government that "O. T." was Warren. On the other hand it is claimed by appellant Danziger that "O. T." was a person known to him to be named George Carleton. Several memoranda were intended to be directed to a person whose true name was George Carleton. For an understanding of this controversial subject, it is important to consider the following: As previously asserted, there is no evidence to show that Warren (a name disclosed for the first time at the trial) ever communicated the fact to appellants that he was any person other than Carter or Carman, under which names he confessedly was known to all of his business associates. The digest of evidence outlined in our original brief shows that he was the general sales manager in the incipient stages of the transactions. His disclosures at the time of trial reflect that he had under his domination salesmen whose identities were not made known to appellants. We have in mind Robbins, Schaefer, Dawson, Carver, Wright, Callahan and numerous others. [R. pp. 1331, 1346-7.] In the course of undisclosed and legally unrevealed transactions, we find that stock was issued to a W. E. Edwards, an A. L. Roberts and to an Arthur Winslow, to which reference is had in the testi-

mony. However, it requires resort to the occult to reconcile these transactions for which Warren took credit at the time of trial. Nowhere in the record will there be found any direct evidence as to how and under what circumstances these parties became privy to the stock confessedly registered in their names. It is important, however, to note that these stock holdings were acquired while Danziger was in England.

Let us return to the business of "O. T." which is given first attention in the position taken by the Government, and look to the record in relation to the transactions had with Elizabeth T. Parsons, who is the person referred to in counts 1 and 15 of the indictment. [R. pp. 13, 15, 59, 61.] The appellee confesses error as to the latter count 15. (Gov. Br. p. 48.) It becomes important now to give especial attention to the following diagnosis: At the time of trial Warren testified that he had several transactions with the said Mrs. Parsons while Danziger was in England during the years 1935 and 1937. His said transactions were apparently had by communications with the Wake Company in Los Angeles while Danziger was in England, the details of which are left in total obscurity. [See direct evidence of Warren as shown in the Record, pp. 1092, 1379-80, and 1402.] These transactions involved the transfer of stock in some manner acquired in the name of W. E. Edwards and culminated in the proceeds going to W. E. Edwards in a bank account maintained under said name in New York. [See Ex. 106, and R. 1122.] Nowhere in evidence is there a syllable to indicate that Danziger knew anything about these transactions. Moreover, this lady was not a G. E.

Company stockholder and perforce had nothing to do with the alleged arrangement in New York in 1935.

The Government developed at the time of trial [R. p. 1102] that after Danziger returned from Europe, Warren, alias Carter, etc., made no other sales to Mrs. Parsons. The trial court permitted him, over objection, to state that under his direction some other persons were instrumental in contacting her. Let us be careful to focus our attention on this all important series of transactions. May we reiterate that Warren (Carter, etc.) confesses that he never approached Mrs. Parsons after Mr. Danziger returned from England. [R. p. 1102.] The Government at the time of trial attached considerable significance to a transaction involving the sum of $7,000.00 with this lady named Parsons. This transaction is not mentioned in the indictment, nor the previous transactions with this lady. It was the contention of Danziger that on his return in 1937 from England he had been introduced to a man named Winslow, who had purchased a block of stock in the name of Arthur Winslow in which the $7,000.00 check of Mrs. Parsons [Ex. 11, R. p. 409] was involved. The Wake Company received $1300.00 and on cross examination of Warren (Carter, etc.) at the time of trial he advises that he and some associates had privately arranged to acquire a block of privately owned Trinidad stock which had in some manner been passed on to Mrs. Parsons and the Wake Company had received approximately $1300.00 for this block of stock [R. p. 1350; Op. Br. p. 54], keeping in mind that the uncontradicted record shows that Warren did not make this sale and made no subsequent sales. It taxes our imagination to perceive on what hypothesis the Government predicated its contention that appellants herein were an-

swerable by force of the indictment to the two transactions with Elizabeth Parsons, *to-wit:* the transaction of May 15, 1940, which constitutes part of count 1 of the indictment [R. p. 14] and the transaction of December 16, 1940, which constitutes count 15 of the indictment [R. pp. 59-60], and which latter count is confessed to be predicated on error.

Let it be noted that Warren (Carter, etc.) admits without equivocation that he had no transaction with Mrs. Parsons subsequent to 1937 hence upon what evidence does the Government hinge the transaction with Mrs. Parsons on May 15, 1940, in count 1 of the indictment? Mrs. Parsons did not testify about it; in fact, no one did; and more significantly, the Government confesses error in count 15, which is the December 16, 1940, transaction with the same person, *to-wit:* Elizabeth Parsons.

We have previously mentioned that even the 1937 transaction with Mrs. Parsons, which does not constitute a count in the indictment, was had in respect to stock standing in the name of Arthur Winslow. If we turn to the record of the evidence adduced at the time of trial, it will be observed that upon examination of Warren, whose attention was called to certificates numbers 235, 236 and 241 [R. pp. 1351-52] the stock standing in the name of Winslow in July of 1937, that the venerable Warren (Carter, etc.) confesses that he had no knowledge of those shares of stocks and notes, which the record reflects were part of the 1937 transaction with Mrs. Par-

sons. As previously indicated, Warren was not even interrogated about the 1940 Parsons transactions, which are specified in the indictment in counts 1 and 15. We are not unmindful that we have traversed a circuitous route in getting to our point, namely, that Warren (Carter, etc.) and "O. T." (George Carleton, according to Danziger) were not one and the same.

Let us proceed to demonstrate this by reference to the record. It will be remembered that the Government attached considerable importance to a group of postal money orders that were transmitted to George Carleton from Los Angeles in December of 1940 through the so-termed alias of Levy. [Ex. 17.] Let us look to the transcript [pp. 1212-1214]. It will be noted that these were transmittals of a portion of the $1500.00 Parsons check, count 15, to George Carleton. When Warren was asked from whom he received these monies represented by the said transmittals, he answers that he doesn't know. [R. p. 1214.] This answer was made after a colloquy between the Court, Government's counsel and appellants' counsel, in which allusion was made to the fact that these postal money orders were obtained upon an application of A. Levy and were manifestly a portion of the proceeds of the Parsons check mentioned in count 15. It appears to us that it would be sophomeric to argue that if Warren (Carter, etc.) was George Carleton, the person to whom these proceeds were transmitted, and that there was any agreement between him and Danziger to transmit these monies under the name of Levy or any other name, that

he would not know from what source these proceeds emanated. Perhaps we are not making our point clear, but we can advert to the fact that Warren (Carter, etc.) admitted that he had no transaction with Mrs. Parsons subsequent to 1937, and we are now dealing with the Parsons transaction in 1940, which forms the basis of the material allegations in counts 1 and 15, the latter being the count concerning which the Government confesses error.

Now, then, let us look to the record [pp. 917-8]. It will there be noted that an inquiry of Danziger was being made concerning the $1500.00 check (count 15). This inquiry was pursued by reference to a Western Union telegram dated December 8, 1940, which telegram was addressed to George Carleton and significantly signed "O. T."

Danziger, according to the undisputed testimony, was not the author of said telegram. Nevertheless, it appears in uncontradicted form that "O. T." communicated with George Carleton directly with respect to the transaction with Mrs. Parsons, which was the basis of count 15, and which the Government confesses was erroneous, and which, as we have hereinbefore outlined, is too manifest a refutation of the Government's contention (a) that Carleton was Warren, and (b) that when Danziger communicated with Carleton he was communicating with Warren (Carter) as "O. T." The Western Union telegram alluded to [R. p. 917] is reproduced in photostat herewith.

The Government Has Failed to Directly Meet the Significant Issues Presented in the Opening Brief.

In our opening brief at page 89, we assert in unequivocal nomenclature: "There is no evidence in the record that Carter ever disclosed to Danziger the use by him of any other name than Carter or Carman." We submit that appellee's brief fails to meet this all-important challenge by reference to a scintilla of evidence in the record.

In our opening brief (pp. 99-100) we asserted: "The Government asks us to assume that these appellants had knowledge, and, moreover, had agreed to this manifestly unauthorized and unbridled program of Carter and his confreres. But where is the evidence showing this as a fact?" We fail to note any direct replication to these all-important challenges. It is respectfully submitted that apparently opposing counsel fails to give heed to the well-known legal idiom:

"Factum unius alteri nocere non debet."

If we are to assume that the answers to these all-important queries are contained in the appellee's brief under the caption at page 19, reading: "Evidence in Support of Individual Counts," let us at once proceed to an analysis and inspection of what appears in said brief in support of this contention. It will be noted at page 19 of said document that allusion is had to the factual pictures backgrounding the Government's case, that while Danziger was in England during 1936, Warren (we recognize that this individual under his several names is now definitely known to be the person referred to alternately as Carman or Carter, but hereinafter we shall endeavor to refer to him as Warren) contacted a Mrs. Parsons. Then follows a recital of what Warren is reputed to have stated to

Mrs. Parsons and a reference to certain proceeds manifestly procured by him, in which appellants are not shown to have participated. It is important to keep in mind that we are not now dealing with any count set forth in the indictment, but all of these matters are being proposed in support of count 1. Opposing counsel makes no attempt to show that these irrelevant recitals were indeed communicated to any of the appellants who now stand convicted of the offenses charged in the indictment.

The Government, as will be noted at page 20 of the brief, is content to rely on a disconnected group of generalities, such as:

> "* * * At the time I wrote in detail to the Wake Development Company office, Aloa Faulkner, and told them what I was doing."

Is there any legal precedent that may be looked to to justify this form of evidence as being sufficient to support in point of law a conviction for a crime? If we are to assume that this declaration by a co-defendant is legally competent, the question at once arises—As to which defendant? Is it Wake Development Company? Is it T. I. P.? Is it Danziger? Furthermore, what relationship do these *ex parte* declarations have to do with the transaction with Mrs. Parsons in 1940, which transactions incidentally are the ones alluded to in the indictment, counts 1 and 15? The answer to this at once becomes apparent when we recognize that the Government confesses error in the Parsons' transaction specified in count 15. It is also significant that the transaction which forms the basis of count 1 in the indictment is also a

1940 transaction. We have hereinbefore taken the pains to demonstrate the utter lack of relationship in the proof so far as these 1936 and 1937 Parsons' transactions have to the ones charged in the indictment, *to-wit:* in 1940.

The Government concedes that Mrs. Parsons did not testify, and, hence, where is there any substance in the form of evidence to support the theory expounded in connection with these counts?

Advancing now to appellee's endeavor to give support to count 2 in its brief at page 23 *et seq.,* it will be noted that this item pertains to a transaction with a Mrs. Lawyer. Mrs. Lawyer is conceded to have not testified, and here, in conformity with a conveniently adopted pattern, the Government strains to rely on the testimony of Warren. The brief makes some cursory allusions to what Warren testified to assertedly in a conversation with Mrs. Lawyer; also there are some declarations of what he is supposed to have stated to her over the telephone. In an endeavor to augment these manifestly incompetent recitals, opposing counsel presents as a declaration on the part of Warren: "I wrote to the defendants. * * * I do not remember all of the letter, but I suggested certain things in the letter. * * *" (App. Br. p. 25.) Of course, no original or copy of this writing was in this instance, or in any other instance, produced. However, apparently Government's counsel is of the mind that this is legal evidence. We profess ignorance of any legal authority supporting this manifestly incompetent material. Moreover, mind you, this unique form of testimony is supposed to establish guilt on the part of defendants, notwithstanding that the Government on its own motion introduced written documents in respect to this transaction by the corporate defendants, to the following effect:

See Exhibit 56, referred to by the Government, in writing as follows under date of March 16, 1939:

> "The stock and notes of Trinidad International Petroleum, Ltd. Company have, in our opinion, much greater speculative possibilities if retained by the stockholder. If your only object in writing to us is to further the sale of any securities you would receive as a result of our exchanging your Golden Quebec Mines stock, then we would not care to have further dealings in the matter."

And under date of April 1, 1939

> "All oil securities, as you know, are highly speculative and Trinidad International Petroleum, Ltd., is no exception.
>
> "We are sorry that we cannot serve you but to ask us to assure you that your investment in Trinidad International Petroleum, Ltd. stock and Preferential Profit Sharing Notes would retrieve all your losses and give you a profit of substantial proportions, would be a responsibility we would not care to assume."

To support count 3 of the indictment we look to appellee's brief, page 27. This involves a transaction with a Mr. Harry F. Pitts, who was not produced as a witness. Appellee's brief outlines in support of this count certain declarations testified to by Warren as having been made to Pitts. There is no evidence that these facts were made known to the defendants save and except to the convenient, although legally not recognized mode of relying on the admittedly hearsay statement of Warren (App. Br. p. 28)

> "I wrote to Wake Company. * * * Later I heard he had sent a check. * * *"

The writings, the author or source are all similarly left in obscurity.

We now advance to the Government's assertions in support of count 4, appearing in its brief, page 29 *et seq.* This deals with a transaction with one F. A. Russell. This individual did not appear at the time of trial. Again the Government relies for support of this count on Warren. It will be noted in the brief that Warren is shown to have had a conversation with Russell, of course outside the presence of any of the defendants, in which he states that while he was in Canada he obtained some names of South McKenzie Mine owners and that Russell was on the list and that he visited Russell; and then follows a quotation of what Warren told Russell at this visit. (App. Br. pp. 30-33.) It may not be amiss at this point to again demonstrate the impropriety of this form of evidence as proof to sustain the conviction of appellants herein. Apropos of this observation, let us go directly to the record evidence as produced by the Government

> "Q. (By Mr. Lucas) All right. Now, you have been using the name South McKenzie Island Mines in this transaction with Mr. Russell; have you prior to this time mentioned that company to Mr. Danziger? A. No, I can't say that I did, I can't remember that I did, although I may have.
>
> Mr. Rose: I move that the latter part be stricken.
>
> The Court: Motion denied.
>
> Mr. Rose: May an exception be noted?" [R. p. 1146.]

Now we come to the treatment of the subject of count 5 by the Government in its brief (p. 34 *et seq.*). This item relates to a transaction with Adelaine B. Skinner, whose testimony appears in the record, page 547 *et seq.*

It is significant in connection with this charge in the indictment to note that the Government's counsel does not rely on the testimony of the lady involved, but in fact he eschews her testimony and apparently is more encouraged by the testimony of Warren concerning the transaction. It will be recalled in our opening brief that we pointed out the fact that the only representation this lady claims to have been made to her was that Trinidad Company owned "potential oil lands in New Mexico." [R. pp. 555-6.] It should be noted that the representations quoted by the Government coming from the mouth of Warren are augmented by hearsay of a henchman of his, named O'Brien, who was not produced as a witness. We have covered this transaction in our opening brief, pages 57-62.

We now come to a consideration of count 6. (Gov. Br. p. 38 *et seq.*) This involves a transaction with one E. Barrie Smith. Here, as previously encountered, we find reliance upon the declarations made on the part of Warren as to what is claimed he stated to E. Barrie Smith, and which are not shown to have been authorized or indeed communicated to the defendants save and except by the quoted declaration in appellee's brief, page 39:

> "I did communicate with the Wake Development Company and told them the circumstances of that call."

Of course, the communication was not produced in any form and its contents up to the present time are grounded upon the quoted generality hereinbefore specified.

Following the last count we now observe the Government seeks to take up count 12, which subject appears in its brief at page 40. This count pertains to the subject of Dr. J. Arthur Hazelton, whose testimony appears in

the record at page 449 *et seq.* It will be here noted that the author of the brief makes no attempt to associate two separate transactions, namely, one in 1938 and one in 1940. In the interest of reducing the voluminosity of this reply brief, we respectfully advert to our analysis of the Hazelton transaction as stated in our opening brief at pages 62-77. In passing may we allude to the contention on the part of appellants that the two transactions embraced in counts 12 and 13 with Hazelton are proved to a point of demonstration to be transactions having no relationship whatsoever to the defendants, save that in the course of Warren's dealings with Hazelton, admitted by the latter to be his attorney under a written power of attorney, the transactions were had at the solicitation of a New York broker pertaining to stocks in which THEY were interested and sought to be procured by them. The defendants receive honorable mention in these transactions merely in an insignificant way. In the complicated mutual transactions involving stock other than that of the appellants herein, as outlined in our opening brief, Warren became a stockholder under the fictitious name of Roberts, undisclosed to defendants. These counts, upon analysis of the evidence prevalent in the record in support of them, demonstrate how far afield opposing counsel has gone in attempting to saddle upon the defendants these transactions. The testimony discloses that Warren, under the alias of Roberts, had called on Hazelton in 1938 and had represented incidentally in connection with his other deals involving a brokerage firm in New York, that T. I. P. stock was listed on the London Exchange. Hazelton at the time of trial admitted that Wake Development Company had informed him in 1938 that the stock was not on the market and was not listed. [R. pp. 532-3.] He,

nevertheless, on his own motion united with Warren in a joint venture under the name of Roberts. Hazelton states, "Roberts was acting as my representative with power of attorney." [*Id.* pp. 533-4.] As outlined in our opening brief, he was dubious of the *bona fides* of Warren and was in communication with him in New York and actually sent him through the medium of postal money orders direct [see Exhibit 17] several hundred dollars. A letter in the handwriting of Warren, which forms the basis of count 13 of the indictment, discloses a fantastic scheme in 1940 on the part of Warren to bilk Hazelton under the deceitful statement that he (Warren) was coming out to Los Angeles and then he was going to fly to Trinidad and he and a group of associates were going to form a syndicate. This especial piccadillo on the part of Warren, when it is sought to tie in appellants to that transaction, on its face is an absurdity.

There is no attempt to point to the record to show that any of the appellants herein were privy to this flippant and childish nostrum, but the Government nevertheless insists in its brief (p. 45) to claim that the defendants, mind you, the corporations and Danziger, were guilty because Warren testified at the time of trial that he wrote this letter to Dr. Hazelton and mailed it out to Los Angeles and asked that it be mailed to reflect the fact that he (Warren) was in Los Angeles. This is a choice bit of sophistry. Opposing counsel does not claim that the contents of this childish letter were ever disclosed to the defendants or any of them. It is contended that it was mailed out in sealed form here to be remailed to Hazelton. The draftsman of appellee's brief admits that this whole thing was a fiction (p. 46) and vaguely struggles to fasten this fantasy upon Danziger by pure assumption, to-wit:

"* * * was the only responsible man in the office of Wake Development Company." (App. Br. p. 47.) Of course, no references are had to the record to establish this and we respectfully submit that this strained endeavor on the part of Government's counsel to fasten responsibility for these personal and mutual relations between the brokerage firm of Phelps in New York, Hazelton and Warren, upon the appellants herein demonstrates their desperation to rely on sheer fantasy as distinguished from legal proofs. May we respectfully ask the Honorable Justices of this Court to refer back to our treatment of this subject in our opening brief, page 62 *et seq.*?

In the brief under consideration, at page 47, count 14 is supported solely by reason of an acknowledgment on the part of one of the corporate defendants of the receipt of a check from Mrs. Lawyer, involving the transaction *ante*, referred to as count 2, namely, the Mrs. Lawyer transaction. Incidentally, this is a propitious time in this discussion to make mention of the fact that the Government contends that apparently, regardless of the *bona fides* of the transactions, if the local bank transmitted the proceeds of any of the several transactions to a bank outside the State of California, that that *per se* involved the use of the mails to defraud.

Since count 15 is admitted to have no substantiation, we now come to count 16, which, according to Government's counsel, is substantiated by the envelope showing the transmittal of the letter referred to in count 1, which is the Parsons 1940 transaction. We have hereinbefore shown that the 1940 Parsons transactions are predicated solely and exclusively on surmise and conjecture. It would necessarily follow that the transmittal of the let-

ter in question could not, therefore, be urged to constitute evidence of the commission of any offense.

We have now reached the final and concluding count, to-wit: the omnibus so-termed conspiracy charge contained in the indictment as count 17. At pages 48 to 50 of appellee's brief, the draftsman is content to rely upon the so-called evidence "hereinbefore summarized." In this case we meet the similar reliance on the declarations of Warren that he " * * * kept Danziger advised." This is augmented by the contention that a code was used and the observation of opposing counsel that this subterfuge was of course designed to protect appellants from an accumulation of documentary evidence. (App. Br. p. 50.) We cannot at this point resist the urge to volunteer the observation that if appellants were apprehensive to protect themselves from an accumulation of documentary evidence that it was indeed naive on their part to surrender voluntarily to the S. E. C. the thousands of pages of writings that find themselves in this record, including the all omnipotent memorandums respecting "O. T."

In this connection, the Government was likewise fortunate in obtaining from Warren the multitude of mutilated documents that he seemingly had preserved from the incipient stages of this saga that gives rise to the present legal controversy, and peculiarly, notwithstanding his propensities, to follow the old adage: "Never send a letter and never destroy one." The record evidence is totally sterile in so far as producing any scrap of paper which gives substantiation to his convenient claim: "I advised Wake Development Company as follows": "I wrote so and so." Are not these latter orally enunciated vagaries the heart and soul of the Government's case ? ? ?

Reply to Appellee's Brief In Re Conspiracy.

(Their Brief pp. 51-59.)

In this segment of the brief presented in support of the Government's position, we find such generalities as "It is evident from the foregoing facts" that appellants and other persons "engaged in an enterprise to foist a worthless stock upon members of the public." The brief then proceeds to make reference to the several hundred page exhibit, namely, Exhibit 92, in apparent substantiation of this unsupported assertion. There follows a statement that the victims were induced to purchase the stock, believing that their investment added to the capital of the company, whereas they in truth were merely purchasing privately owned stock of the Wake Company.

This is followed by a declaration that Danziger had delivered in 1935 to Warren in New York a document referring to the permit which the Trinidad Company had received from the Federal Trade Commission to offer to the public 200,000 shares of its treasury stock.

We have now reached page 53. The draftsman of the brief then proceeds to quote:

> "You are giving them the right to buy it at $3.00 and giving a credit allowance of $2.00 on their stock, and, in addition to that, we are giving them one Preferential Profit-Sharing Note of one pound par value or denomination. We are giving them $10.00 worth of par value and they are only paying in $3.00 in cash . . . of course the stock we are selling them, so you will understand it clearly, is the personally owned stock of the Wake Development Company, but . . . the public won't know the difference, and as far as that is concerned . . .

we clear ourselves by specifically stating in here that no part of these issues will be offered to you." (App. Br. pp. 53-54.)

The above is followed by a recapitulation of the preliminaries that gave rise to the G. E. transaction.

Some cursory statements follow in transposed form purporting to reflect what Warren stated to various persons mentioned in the indictment and finally a reference to the all-important Exhibit 92.

It occurs to us that this part of the brief is a duplication of a portion of the brief originally submitted and stricken. All that can be said about the argument is that it is an opinion which is not based on any specific and competent evidence anywhere to be found in the record. Indeed, it cannot be supported by resort to surmise and conjecture.

Can it be denied that, if the argument is accepted, it in effect is tantamount to a declaration that the S. E. C. is an incompetent organization, for forsooth it confessedly authorized the corporate defendant T. I. P. to foist upon the public a million dollars' worth of its treasury stock on an unsuspecting public, who were not privy to the fact (Government's Contention) that the company had nothing but nebulous, and had to find, interests or property rights? And does not the argument now being considered furthermore boil down to this: the appellants were necessarily guilty of a swindle because they sold to the purchasers named in the indictment the said authorized $5.00 par value shares personally owned by Wake Development Company for $3.00 and threw in the preferential note of $5.00 par value? It occurs to us at this

point that this is the first time that the author of this brief has ever heard that a crime is committed by selling property belonging to a party for less than it is claimed to be worth.

Considerable attention has been herein given to the lack of association between the so-called scheme originating in New York in 1935, namely, to offer certain rights to the G. E. stockholders and prior thereto certain South American Companies on the basis of an allowance for said companies' shares which were of questionable value as part of the purchase price of Wake's privately owned T. I. P. shares. We have already made reference to the fact that appellee in its brief, page 18, states:

> "There had been sales of Trinidad stock prior to Danziger's departure, but none were made to Great Eastern Natural Gas shareholders after he left." [R. p. 1090.]

We have shown that the transactions set forth in the indictment have no relationship to this plan. No rights of this nature or literature purporting to puff the wares of T. I. P. shares are shown to have been transmitted to any of the persons mentioned in the indictment. Moreover, these were persons in the main who sporadically wrote in to trade certain Canadian Mining Company shares on diversified deals for Wake's personally owned T. I. P. stock. We have shown that there is no established plan or agreement respecting these transactions. We have shown that when endeavor is had to look to proof as distinguished from Warren's recitals of what he claims he said to these respective persons, none is to be found. At this point it occurs to us that the draftsman of appellee's brief makes much ado about the statement

purportedly having been made by Warren, and we have nothing but his word for the fact that he on his own account is reputed on occasion to claim that Wake Company was the fiscal agent of T. I. P. Exactly what is sought to be conveyed is not clear. In the opinion of the author of this brief, it is dubious that this self-confessed humbugger is cognizant of the meaning of the term "fiscal agent." We do, however, find in the maze of documents in evidence an occasional reference to the Wake Company being an "underwriter" of T. I. P. We respectfully submit that this relationship is not subject to attack.

We are not going to request that Your Honors read all of the exhibits in the case, which suggestion was offered by opposing counsel in the brief previously stricken, but we do respectfully submit that the S. E. C. did authorize a million dollars' worth of treasury shares to be sold, approved of a prospectus, and had a complete file of the entitlements and herediments of the defendants herein involved, and their personnel. We refer of course to Exhibit A. The Honorable Justices of this Court are of course fully cognizant of the requirements of the Securities and Exchange Commission. As part of Exhibit A, the document dated October 1, 1934, in part reads:

> "(4) The underwriting contract between Wake Development Company and Trinidad International Petroleum, Ltd. as referred to in Registration Statement is still effective."

In the hysteria manifested at the time of trial, as shown in our opening brief, where literally thousands of pages of documents found their way into evidence

without comment and frequently without inspection, and with the gratuity of the trial judge that

> "It depends on how lazy the judge is. The Appellate Court judge reading the record, if he is too lazy to look for the exhibit, he won't look." [R. p. 476.]

we respectfully submit that the case as a whole would be more understandable if the documents in evidence had in the first instance been read and considered in relation to the facts, as distinguished from surmise.

Government's counsel has overlooked what appears to us to be a very important item, namely, that if the documents in evidence *are read,* they will strike down the oft-reiterated but unestablished contention that appellants were in any instance acting in bad faith. While we are contemplating this claim, may we make reference to the record that we can find even in the vicious recitals of Warren the following:

> "Q. How long after that did you next meet Mr. Danziger? A. Well, I think Mr. DeHart went up and completed the contract, and I don't think—
>
> Q. That was outside of your presence? A. I think it was done outside of me, I don't think I was there when he actually signed it. I might have been somewhere near, but I don't think I was right there at the time of the signing.
>
> Q. So far as your memory goes, though, the actual agreement entered into on behalf of the Great Eastern through Mr. DeHart, and Mr. Danziger and others, was signed outside your presence? A. I am

sure it was. I am positive I wasn't present when he signed the contract.

Q. After this contract had been signed, did you have a talk with Mr. Danziger? A. Yes, I had a lot of them.

Q. Tell us those that you remember? A. Well, I couldn't do that unless you will ask me specifically on what one occasion. I try to give you the general background of the whole thing, Mr. Rose, and if you will be specific here and tell me—I just couldn't go on and tell you about a lot of conversations with Mr. Danziger, because I had a great many conversations with Mr. Danziger.

Q. In these several conversations that you had with Mr. Danziger preceding his departure for England, had he told you anything other than what you have already related here affecting the character and nature of the properties involved? A. Yes, I will say that Mr. Danziger always tried to tell me that the properties were very good.

Q. Did he ever tell you anything to the contrary? A. No, he never did.

Q. From your observation as a man of experience— A. He told me they were very fine properties.

Q. Did he ever tell you anything otherwise? A. What do you mean 'otherwise'?

Q. Well, did he ever tell you he had changed his mind about the character or value of these properties? A. Never to my knowledge. He always boosted them.

Q. Didn't he tell you he expected to become very wealthy out of the actual oil production? A. Well, he might have said that." [R. pp. 1308-1310.]

Now let us consider whether the S. E. C. in the first instance was informed concerning the *modus operandi* of the acts of Wake Company in disposing of its T. I. P. privately owned shares in the manner indicated. The Honorable Justices of this Court are respectfully referred to section 20 of the Securities Act of 1933, as amended. One of the major contentions of appellants is that they, in so far as any acts chargeable to them are concerned, were acting in good faith.

Appellants claim that contemporaneously with the matters alluded to in the indictment, they were at all times cognizant that the S. E. C. was advised, informed and knew, in so far as any acts on the part of appellants were concerned, that the method and mode of disposal of Wake Company's T. I. P. shares, which is claimed by the Government to constitute criminal conspiracy, was *bona fide* and not in violation of the Securities Act. In substantiation of this claim, we respectfully refer to the record of evidence in the case at bar wherein the S. E. C.'s representative, who participated in the proceedings preliminary to the indictment and subsequently at the time of trial, discloses the following:

[Testimony of Allen G. Mainland, R. p. 975] * * *

"Q. By Mr. Rose: You ascertained, did you not, the fact that these Great Eastern Stockholders would send in a request to exercise such rights to the Wake Development Company? A. [R. p. 976.] They did either in '36 or early in '37. I couldn't say exactly.

Q. All right. They had before them the fact that the stock was being sold at various prices below $5.00 in that manner? A. Yes.

Q. That an allowance was being made for the so-called shares in the Great Eastern Gas Company? A. Yes. * * * They had before them the fact that rights had been offered to All Americas Petroleum, South-American Oil Fields, and Great Eastern Natural Gas.

Q. All companies that were more or less defunct? A. I now believe they were. I don't know whether the Commission knew so at the time.

Q. And a certain allowance was made for their so-called defunct stock? A. Yes."

[R. p. 978] * * * (The following question was read):

"Didn't he say that the mode of doing business of the sale of Wake Development Company's holdings of Trinidad stock had been investigated as to the manner that I have previously outlined to you, namely, an allowance for shares in a defunct company, the exercise of the so-called rights and the letters going into the Wake Co. asking for permission to exercise the rights and so forth?

The Witness: I don't recall Mr. Danziger saying so; but I do know that the Commission had that information. * * *"

[R. p. 981] * * *

"Q. By Mr. Rose: You are familiar with Section 20 of the Act? A. I can't say that I am.

Q. Well, take a look at it. A. After reading the Act I think I am fairly familiar with that.

Q. Wasn't this section discussed between you and Mr. Danziger? A. I wouldn't say that it wasn't. I don't recall ever discussing it with him, but I

wouldn't want to be too positive about it. It may have been.

Q. He told you that no injunction had ever been applied for or issued? A. He may have. I knew there hadn't been. * * *"

From the foregoing it cannot legitimately be urged that appellants were not justified in looking to the S. E. C. for a stop order if the procedure on their part, insofar as it relates to anything giving rise to the charges contained in the indictment, was irregular or improper.

The Authorities Cited by the Government Are not in Point.

Under the exigencies prevailing in this case as known to this Honorable Court, we have been limited by time, allotted in preparing and submitting this reply brief; that is to say, we have had no time in the remotest degree comparable to the time taken by the Government to submit its brief. We would be remiss in our duties if we submitted no replication to the legal authorities claimed by appellee to be pertinent and controlling.

In the Government's brief, p. 57, reliance is had upon the number of cases which are merely mentioned by name and citation. In the case of *Myers v. U.* S., 223 Fed. 919, and in the case of *Wilson v. U. S.,* 190 Fed. 427, the facts backgrounding both of these cases are the very antithesis of the situation admitted to exist by the Government in the case at bar. We have previously quoted from the Government's brief at page 54 the acknowledgment that the stock involved in the transactions giving rise to

the indictment was the personally owned stock of Wake Development Company, and that oral and written declarations that the same was not treasury stock is established to a point of demonstration. The Government claims that notwithstanding these clear-cut pronouncements, nevertheless the persons named in the several counts of the indictment were perhaps deceived into the belief that they were augmenting the treasury of T. I. P. and were getting original treasury certificates. It is sheer sophistry to claim that where a person has been told orally and in writing: YOU ARE NOT RECEIVING ANY TREASURY STOCK, to claim, nevertheless, that such persons believed that they were. Here, like in other instances illustrated ante, the argument is not based on facts, but, on the contrary, contrary to the facts. Let us not lose sight of the all important matter that the sales involved in the several counts in this indictment are not supported by any prior misrepresentations made through the medium of the U. S. mails. The so-termed false representations are those personally attributed to Warren, who by the proofs showed in the first place no authority; in the second place no sanction; in the third place no knowledge on the part of the appellants; and, finally, no ratification, but on the contrary, in all instances where the utilities of the Government were used, an utter and unequivocal refutation.

It would serve no purpose to give any extended discussion on this point. The *Myers* case, *supra,* involves the case of written representations of a sale of treasury stock with express pronouncements that the proceeds were to go into the company's treasury.

The *Wilson* case, *supra,* involved a similar situation.

In the case of *Kaplan v. U. S.*, 18 Fed. (2d) 939, the representations made were all by mail and there was a clear-cut fictitious offer similarly by mail.

In *Butler v. U. S.*, 53 Fed. (2d) 802, cited by appellee, there was a representation made that certain notes were secured by cattle and the fact was that there was no security. And may we reiterate that insofar as the charges contained in the indictment under which appellants were tried are concerned, there is no evidence of the use of mails respecting said transactions of any representation. There is no evidence that any representation made by mail was not indeed as true as Holy Writ. The authorities cited are not subject to any criticism other than that they are based on facts diametrically opposed to those in the case at bar.

We would like to conclude with the following cursory references to authorities.

It is well settled that presumptions cannot be based on presumptions. *Vernon v. U. S.*, 146 Fed. 121; *Freeman v. U. S.*, 20 Fed. (2d) 748.

The basis of the conspiracy is what has been agreed to, not what has been done. *U. S. v. Direct Sales Co.*, 40 Fed. Sup., 917.

Proof of crime committed by one or more of a number of co-defendants, wholly apart from and without relation to others conspiring to do the things forbidden, cannot support a conviction. *Wyatt v. U. S.*, 23 Fed. (2d) 791; *Terry v. U. S.*, 7 Fed. (2d) 28.

In our opening brief we made numerous references to legal authorities that evidence of what salesmen said to prospective clients in the absence of evidence showing

authority or ratification is not binding upon the principal. We now again refer to *Beck v. U. S.*, 33 Fed. (2d) 107; *U. S. v. Corlin,* 44 Fed. Sup., 940; *Barrett v. U. S.*, 33 Fed. (2d) 115.

In hastening a conclusion of this brief, we respectfully request consideration of the authorities originally submitted in our opening brief. We cite the cases of *Holmes v. U. S.*, 134 Fed. (2d) 125, and *Marino v. U. S.*, a decision of this Honorable Court, in 91 Fed. (2d) 691; and likewise, if we have not previously mentioned it, we refer to the case of *Weinger v. U. S.*, 47 Fed. (2d) 692.

All of the authorities are cases that have been given consideration by this Honorable Circuit Court.

May we respectfully conclude with the observation that the overt acts charged in the indictment were not in furtherance of the conspiracy frantically sought to be maintained as existing on the part of the appellee in its brief, but is based on contentions that have consistently been held to constitute a departure from well recognized authorities. We submit the case of *Miner v. U. S.*, 57 Fed. (2d) 506.

For the reasons herein presented and upon the grounds not expressly herein specified, but mentioned in the oral argument and in our opening brief, we deferentially state that the judgments of conviction should be reversed, with instructions to dismiss the indictment. We submit that the manner of trial, the manner of the reception of proofs, the manifest departure from due process, and in all events on legal precedent, require a reversal.

Respectfully submitted,

A. Brigham Rose,

Attorney for Appellants.

WESTERN UNION

P. B. WHITE
PRESIDENT

NEWCOMB CARLTON
CHAIRMAN OF THE BOARD

...and the following telegram subject to the terms on back hereof, which are hereby agreed to

LOS ANGELES, CALIF.
DEC 8 1941

...org Carlton,
C% Western Union,
New York City

Will be allright.

OT

Charge: MU 5698